SUPREME COURT, U. S.

FILED

OCT 27 1969

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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 310

AUDLEY MOORE & SON,

Petitioners,

v.

GENERAL INSURANCE COMPANY OF AMERICA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

IRION, CAIN, MAGEE AND DAVIS,
830 Mercantile Bank Building,
Dallas, Texas 75201.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
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To The Honorable Mr. Justice Burger, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

Petitioner Audley Moore & Son originally filed this action in the United States District Court for the Eastern Dis-

trict of Texas, on April 20, 1967, under the provisions of 40 U.S.C.A. 270A, the Miller Act, against respondent, surety upon a prime contractor's payment bond. The prime contractor, Professional Constructors Inc., had contracted with General Services Administration to build a post office in Sulphur Springs, Texas. One of the subcontracts made by the prime contractor was entered into with petitioner on March 8, 1965 (plaintiff's Exhibit 1), such subcontract forming the basis of the petitioner's complaint. Such complaint alleged an indebtedness owing petitioner of $16,345.78. Respondent's defense, which was upheld by the United States Court of Appeals, Fifth Circuit, was that petitioner's complaint was barred by the Miller Act's limitation provisions:

> (40 U.S.C.A. 270b (b)): "* * *but no such suit shall be commenced after the expiration of one year after the day on which the last labor was performed or material was supplied by him * * *"

As stated in the opinion of the Court of Appeals (admitted by petitioner) "It is undisputed that the only thing done by Moore after April 2, 1966 was to take final measurements and to make a final inspection pursuant to preparation of his final estimate or statement. This was done in the latter part of April. All other activity had ceased and all materials had been supplied as of April 2."

In other words, *more than one year* prior to filing suit, *all contractual labor had been performed and all required material* delivered and installed. All of the labor that General Services Administration required to be done, and the subcontract set forth, had been *finished*. Petitioner's admitted

sole activity was his self-serving ministrations to enable him to bill the prime contractor for his services. All the labor he agreed to render was done, and all the materials he agreed to furnish had been supplied by April 2, 1966; suit was filed April 20, 1967.

ARGUMENT

1. Petitioner's "Question 1" attacks the holding of the Court of Appeals that "Going on the premises to make final inspections and measurements *for the purpose of* preparing a final estimate or statement is insufficient as a matter of law to constitute supplying labor within the meaning of 40 U.S.C.A. 270(b)". (Emphasis added) In the face of this holding, the only argument advanced to this court by petitioner is that the Miller Act should be given a "broad" and "liberal" interpretation, to the end that since the subcontract requires petitioner to bill the contractor upon completion of the job based upon the subcontractor's estimates, *if the subcontractor actually goes to the job-site* and makes measurements, then that activity constitutes the performance of "labor" within the meaning of 40 U.S.C.A. 270(b). There is no reported case in which the performance of such an activity has been held to constitute "labor" within such statute.

The absurdity of petitioner's line of reasoning is manifest. There are many provisions in the subcontract here in-

volved which impose a duty upon one or both of the parties. The Court of Appeals succinctly stated the impossibility of adopting petitioner's construction of the Miller Act:

> "The gist of appellee's argument is that anything which he did in compliance with the terms of his contract constituted furnishing labor in the prosecution of the work, and until he discharged his every legal duty under the contract the statute of limitations did not begin to run. Labor furnished in the prosecution of the work is not coterminous with the outer limits of all duties provided by the contract. Without attempting a definitive list we point out that the contract required appellee to furnish partial releases and partial waivers of liens from his materialmen and creditors as from time to time requested by the prime contractor, to furnish final releases and waivers of liens at the time of final payment, to pay unemployment and retirement taxes (state and federal), and to defend against claims arising from the agreement. The performance of any or all of these obligations can occur after appellee's work is complete and can require expenditure of time and effort by him."

None of the cases cited by petitioner have anything to do with his proposition that engaging in any activity required by contractual provisions prevents running of limitations. *U. S. for the Use of Sherman et al v. Carter*, 353 U.S. 210, 77 S. Ct. 793, arose at a time when the former provisions of sec. 270(b) provided:

> "* * * no such suit shall be commenced after the expiration of one year after the date of final settlement of the contract."

The reasons for amendment of the section so as to change the requirement from "date of final settlement" to the present criteria will be discussed below. In this case, the trustees of a health and welfare fund sued the surety for contri-

butions to that fund which the contractor failed to make, but which he had been obligated to pay under a subcontract. The money sued for was 7½ cents per hour worked by certain construction employees; that money was a part of the contractual rate paid for the labor involved. There was no issued involved relative to whether certain contractual activity was or was not labor within the meaning of the limitations section of the Miller Act, and there could not be, inasmuch as sec. 270b *did not then contain the present language*, but simply provided for measurement from "*the date of final settlement of the contract*". The case is wholly foreign to the question at hand.

Another of petitioner's "liberal construction" cases which he cites is *U. S. for Use of Westinghouse Electric Supply Company v. Enderbrock-White Company*, 275 F. 2d 57; it does not even deal with the limitations provision, but instead is concerned only with the *notice* section, 270(a), required of remote subcontractors! Again, it arose prior to the 1959 amendment of 270(b), when that section referred only to "final settlement". The case is also concerned only with material supplied, and not labor; the question in the case is answered by the court at p. 60:

> "We hold that in order to recover under the Miller Act, it is not required of the materialman that he prove that his materials were actually used in the prosecution of the work of the prime contract, but only that in good faith he reasonably believed that the materials were so intended."

Thus, again, petitioner's reference to this case is a waste of time.

The *Westinghouse* case, supra, cites as does petitioner, *U. S. for Use of J. B. Byrne & Co. v. Fire Assn. of Philadelphia*, 260 F. 2d 541. It is difficult to conceive how petitioner can, in good faith, contend that this case has any relation whatsoever to the issues at hand. The facts arose *prior* to the 1959 amendment of sec. 270b(b); did *not* deal with limitations in any way; did *not* involve "labor" or a definition of labor for any purpose, but instead, under the peculiar facts there, whether tires consumed on the job constituted material supplied within the act.

The cited case of *U. S. for use of Austin v. Western Electric Co.*, 337 F. 2d 568 simply reverses a summary judgment and remands for trial because the court found that a fact issue existed as to the date on which the last of the subcontract work was actually completed (not substantially completed), noting various activity pursuant to a "punch list" which might be original contract labor (overlooked earlier) instead of "corrections, repairs and cleanup" (the later category is held not to constitute labor for sec. 270b(b) limitations purposes. There was no question involved of whether activity such as making estimates, sending bills or other contractual activity, as distinguished from the labor on the project, had any relevance to sec. 270b(b) limitations.

We might pause to cite further general language in the *Austin* case, supra, in view of petitioner's repetitive citation of general language espousing the liberal construction of the Miller Act (at p. 572):

> "The Miller Act is entitled to a liberal construction and application in order properly to effectuate the Congres-

> sional intent to protect those whose labor and materials go into public projects. * * * *But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds.*' (emphasis added) *Clifford F. MacEvoy Co. v. U. S.*, 1944, 322 U.S. 102, 64 S. Ct. 890; *U. S. v. Carter*, 353 U.S. 210, 77 S. Ct. 793; *Apache Powder Co. v. Ashton Co.*, 264 F. 2d 417."

Petitioner also cites the old case of *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F. 2d 527 (1946), apparently for additional general language therein speaking of "remedial nature" and "liberal construction". There, again, the court was dealing with the pre-amendment version of sec. 270b(b), and the issue was not whether contractual duties could be considered as "labor", but whether the subcontractor's charges for gasoline and oil used in delivering material to the job-site could be recovered under the Miller Act. Neither this case nor the ones above analyzed are of the remotest application to the issue in the case at bar.

As noted hereinabove, sec. 270b(b) was amended; it formerly provided:

> "* * * but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract."

The amendment to its present verbiage occurred in 1959; its obvious purpose was to obviate the inherent confusion in determination of "date of final settlement." The U.S. District Court, in *Travis Equipment Co. v. D & L Construction Co.*, 224 F. Supp. 410 (1963), observed in this regard:

> "Senate Report No. 551 of the 86th Congress — 1959 — attached and incorporated a letter of February 24, 1959

of the Comptroller General of the United States in support of its recommendation of the 1959 amendment to the Miller Act. That letter set forth the complications that had resulted from the use of the 'final settlement' language that had been incorporated into the Miller Act from the earlier Heard Act. It also pointed out the administrative burdens and practical uncertainties that resulted from the former requirement of the Miller Act which required the Comptroller General to conclusively fix the date of final settlement. * * *

"And in our determination of Congressional intent, we must also take into account that one of the 'beneficial results'—was, as the Comptroller General's letter pointed out, that the supplier would know simply by consulting his records the precise time when the 1-year limitation began to run and (by adding 1 year) when his right to sue would expire."

General Electric Co. v. Southern Construction Co., 383 F. 2d 135 (1967, 5th Circuit) held:

"As we view Section 270(b), there is nothing ambiguous or doubtful about the language, 'after the expiration of one year after the day on which the last of the labor was performed or material was supplied' by the claimant—The court must give effect to the plain and obvious meaning of the statute without reading in or reading out."

To allow a subcontractor to *delay the running of such period by the technique of walking around the job, and preparing his final bill would be to "read in" or "read out"* — to amend the statute. Thus amended, the statute might provide:

"* * * after the expiration of one year after the day the claimant made his final inspection";

Or, would petitioner like this wording better:

"* * * after the expiration of one year after the day claimant complies with the contractual provision relative to furnishing final estimate";

Or:

"* * * after the expiration of one year after the day on which claimant sends his final bill".

The courts have consistently applied the plain words of statutes so as to protect those parties for whose benefit such statutes were designed. In the case at bar, as seen above, the plain words of Section 270b(b) will simply not stretch far enough to allow petitioner one year and eighteen days in which to file his suit — April 2, 1966 to April 20, 1967. There is no room in the Miller Act for this type of sophistry and dissimulation. The 1959 Amendment allows a subcontractor to precisely determine his rights, by simply noting the last day he performed labor or furnished material. The record unequivocally establishes that appellee's "last work" and "last materials" were performed and furnished, on or before April 2, 1966. As held by the Fifth Circuit:

> "Petitioner's theory would defeat the purpose of the 1959 amendment to Section 270b(b) and restore some of the uncertainty the amendment was designed to remove. Congress, by that amendment. attempted to set a specific, easily ascertainable date on which limitations begins to run. This court previously has said that the language of Section 270b(b) is unambiguous and that the court must 'give effect to the plain and obvious meaning of the statute without reading in or reading out.' *General Electric Co. v. Southern Construction Co.*, 383 F. 2d 135, 138 (5th Cir. 1967). We will not depart from that rule now."

Respondent submits that the circuit court's opinion adopting its position is sound, states what the law is and what

the law should be. "Labor" should be construed to be those activities of the subcontractor which accomplish the construction project. To adopt petitioner's theory would result in total uncertainty in commencement of the one-year period, and would allow any activity referred to or required by contract to postpone commencement of limitations. The numerous requirements and activities required by the provisions on the reverse side of petitioner's subcontract — petitioner's Exhibit 1 — could be done at various times after the last project labor was supplied and material furnished. The construction adopted by the circuit court allows a full year, commencing from an easily ascertainable date.

2. Petitioner's "Question 2" is so brief and vague as to be virtually unintelligible. Apparently, petitioner is contending that if respondent's attorney represented it in another suit unconnected with the case at bar — *U. S. for use of Larich, Inc. v. Professional Constructors and General Insurance Company of America*, No. 1002 in the U. S. District Court for the Eastern District of Texas, then he somehow became, *eo instante*, counsel for General Insurance Company in *this case*, which had *not yet been filed* in the U. S. District Court. The role of non-existent counsel in a non-existent case seemingly supplies some defect in petitioner's theory of estoppel, but whether that be the element of misrepresentation, reliance or damage, we are not advised. We are tantalized by petitioner's mysterious statement in his brief, at p. 15 (in the 15 lines devoted to "estoppel") that "the evidence in the case supports the finding of the jury, that respondent's attorney was its attorney during these negotiations". Since we

are not favored with an analysis or explanation of petitioner's theory, we shall be content with the circuit court's statement relative to "estoppel":

> "Appellee also claimed at the trial, and submitted to the jury, that appellant was estopped from asserting limitations as a defense because: (one), by its letter dated March 28, 1967 appellant led the 'plaintiff to reasonably rely that the defendant would take some type of remedial action in seeing that plaintiff's claim was investigated and at a further date would advise him of what course of action the defendant planned to follow in connection with this claim;' (two), that appellee's attorney negotiated with the attorney for appellant about the joinder of General Insurance in a state court action but those negotiations failed and this action was instituted forthwith; (three), that a statement made in a letter from appellant's attorney to General Insurance about when the limitations period expired caused appellee to rely on that date as the date to file suit.
>
> "All of these matters are insufficient as a matter of law to create estoppel, under the circumstances of this case. The letter of March 28, 1967 is set out in the margin. It contained no representations or promises which might reasonably be expected to induce reliance by Moore or his attorneys to its detriment, nor was there any deception. *McWaters & Bartlett v. United States*, 272 F. 2d 291 (10th Cir. 1959)."

No deception, misrepresentation or reliance can be found in the record, and the point is wholly without substance.

3. Petitioner's questions 3 and 4 are frivolous, and presented here for the first time. The four cases cited under question 3 deal with the situation where a motion for judgment NOV or for new trial are filed *after* entry of judgment,

and not disposed of by an order. Here, on October 13, 1967, respondent filed its Motion for Judgment NOV. Thereafter, on January 26, 1968 judgment was entered by the trial court in behalf of petitioner, which action obviously overruled and disposed of respondent's pending motion. We are thus at a loss to follow petitioners argument that somehow the motion for judgment filed October 13, 1967 is still undecided, notwithstanding judgment having been entered January 26, 1968, and motion for new trial having been overruled by order entered February 26, 1968. There is no requirement in the Federal Rules of Civil Procedure that a judgment state that it overrules pending motions; obviously it does so automatically.

We do observe the following guiding principles, from *Cyclopedia of Federal Procedure*, sec. 57.12:

> "Although from the earliest days of the federal courts the statutes have laid down the requirement of a final judgment or decision as a prerequisite to review, they have contained no definition of the term, leaving it to be drawn from statutory construction by common law principles and from implications yielded by other statutes.
>
> General statements by way of definition of the terms "final decision" and "final judgment" have been numerous, making, in the long run, for confusion by reason of their differences of phraseology and emphasis. A final judgment, it is sometimes said, is one that puts an end to the controversy between the parties litigant, disposing of the whole merits of the controversy or of some independent, unrelated portion thereof, leaving nothing to be done but to enforce by execution what has been

determined. Stated in another way, a judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined; so that if there should be an affirmance by the reviewing court, the court below would have nothing to do but to execute the judgment or decree it had already rendered. In short, a final and appealable adjudication is one which involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal."

Sec. 57.14:

"As appears from the discussion in subsequent sections, many factors enter into the finality of a judgment or decision. The words 'final decision,' as used in a statute, are given a liberal and reasonable construction. In determining whether a judgment or decision is final, the federal courts regard substance rather than form and are guided by practical rather than theoretical considerations. Whether a final judgment has been rendered depends primarily upon the intention of the court as gathered from the record as a whole, illumed to some extent by local rule or practice."

Sec. 57.17:

"The finality of an order depends, not upon its name, its property, or its normal function, but upon whether it disposes of the whole case on its merits so that the court has nothing to do but to execute the judgment or decree already rendered. The form of the judgment is not necessarily determining, as, conceivably, it may constitute a final decree although interlocutory in form or time. Whether or not a judgment is final is to be determined by the force of the decision itself, and not by contingencies outside the record, by the essence of what is done, and not by the appellation given the decision by the court rendering it."

The judgment, which appears at p. 76, transcript, recites:

> "It is ORDERED AND ADJUDGED that the Plaintiff, Audley Moore & Son, recover of the defendant, General Insurance Company of America the sum of $16,345.78, plus the sum of $5,448.60 as attorneys fees, totaling $21,794.38, with interest thereon at the rate of 6% as provided by law, and cost of action."

Certainly, nothing could be more of a final disposition of the entire controversy between the parties. The only motion filed thereafter was duly overruled by order entered February 26, 1969 (Tr. p. 81).

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CONCLUSION

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals is correct, that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Dated October 20, 1969.

IRION, CAIN, MAGEE AND DAVIS,
830 Mercantile Bank Building,
Dallas, Texas 75201.

M. R. Irion

Don W. Davis
Attorneys for Respondent.

CERTIFICATE OF SERVICE

Service on counsel for petitioner Artie P. Stephens has been made by placing a copy of the foregoing brief in opposition in the U. S. mail, postage prepaid, properly addressed to him at 110 North Davis Street, Sulphur Springs, Texas.

M. R. Irion

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26241

GENERAL INSURANCE COMPANY OF AMERICA,
Appellant,

versus

UNITED STATES for the Use of
AUDLEY MOORE & SON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(January 21, 1969)

Before ALDRICH,* GODBOLD and DYER,
Circuit Judges

GODBOLD, Circuit Judge: Sulphur Springs, Texas has a new post office and federal building, and Audley Moore & Son, as a subcontractor of Professional Constructors, helped build it. Moore, not having been paid, made proper demand on Professional on May 4, 1966 for payment for labor and materials furnished. Pay-

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*Of the First Circuit, sitting by designation.

ment was not made. This Miller Act case, 40 U.S.C.A. § 270a *et seq.*, against General Insurance Company of America as surety on Professional's payment bond was filed April 20, 1967.

The primary issue on appeal, which is dispositive of the case, is whether the claim was barred by the statute of limitations in the Act.[1] The trial judge overruled this defense and submitted the case to the jury, which returned a general verdict for appellee for the amount claimed.[2] The crux of the case is a determination of when the "last of the labor was performed or material was supplied."

It is undisputed that the only thing done by Moore after April 2, 1966 was to take final measurements and to make a final inspection pursuant to preparation of his final estimate or statement. This was done in the

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[1] 40 U.S.C.A. § 270b:

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing . . . , but no such suit shall be commenced after the expiration of one year after the day on which the last labor was performed or material was supplied by him. . . ."

[2] The trial judge charged the jury that before returning a verdict for either party they must determine the last day upon which labor or material was furnished. They were instructed that if the last day was prior to April 20 the verdict must be for the defendant; if after, they should find for the plaintiff. The judge also charged that even if they found the work was completed prior to April 20, they still could find for plaintiff if they also found that defendant was estopped from asserting the limitations defense. Since the jury returned a general verdict, we do not know which theory was the basis of the verdict.

latter part of April. All other activity had ceased and all materials had been supplied as of April 2.[3]

We conclude that the limitations period began to run on April 2, 1966. Appellee had one year from that date in which to file suit. Going on the premises to make final inspections and measurements for the purpose of preparing a final estimate or statement is insufficient

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[3]The undisputed evidence shows that the last of fifty-five payroll statements which Moore submitted to Professional was for the period of March 31, 1966 to April 2, 1966. The only work done after that date was characterized by Mr. Moore as follows:

"Q. Mr. Moore, what was the last work that you did on the project location itself?

A. That was final clean-up.

Q. And when was this done?

A. The last day of April and part of the first day of May. I wouldn't be positive of the two days, but it was in the latter part of April or the first of May.

Q. Did you do anything else on the project at that particular time?

A. Made all my final inspection and final measurements.

Q. Now, measurements of what?

A. Field measurements of work performed, such as so many lineal feet of curb and gutter, so many square feet of sidewalks, so many square feet of asphalt pavement.

. . .

Q. . . . what work, then, did you—did your firm do, sir, after, April 2, 1966?

A. Along the latter part of April my son and I went down and made all final inspections and final measurements on the project, computing it to make a — to make a final estimate.

Q. Final inspections — final measurements?

A. To see if there was any cleaning up or anything to do to the job.

Q. Did you do any cleaning up?

A. As well as I remember, there wasn't anything to do (Excerpts from Direct and Cross Examination.)

as a matter of law to constitute supplying labor within the meaning of 40 U.S.C.A. § 270b(b). Such activity involves no more "labor" than correcting defects in prior work. Yet correction of errors has been held insufficient to extend the time for filing suit. *See United States ex rel Barney Austin v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964); *United States ex rel Circle-L-Electric Co. v. Hyde Construction Co.*, 255 F. Supp. 335 (N.D. Okla. 1966); *United States ex rel McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 185 F. Supp. 381 (M.D. Pa. 1960).

Appellee's theory would defeat the purpose of the 1959 amendment to section 270b(b) and restore some of the uncertainty the amendment was designed to remove.[4] Congress, by that amendment, attempted to set a specific, easily ascertainable date on which limitations begins to run. This court previously has said that the language of section 270b(b) is unambiguous and that the court must "give effect to the plain and obvious meaning of the statute without reading in or reading out." *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 (5th Cir. 1967). We will not depart from that rule now.

Appellee also claimed at the trial, and submitted to the jury, that appellant was estopped from asserting limitations as a defense because: (one), by its letter dated March 28, 1967 appellant led the "plaintiff to reasonably rely that the defendant would take some

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[4]The amendment substituted "day on which the last of the labor was performed or material was supplied by him" for "date of final settlement of such contract."

type of remedial action in seeing that plaintiff's claim was investigated and at a further date would advise him of what course of action the defendant planned to follow in connection with this claim;" (two), that appellee's attorney negotiated with the attorney for appellant about the joinder of General Insurance in a state court action but those negotiations failed and this action was instituted forthwith; (three), that a statement made in a letter from appellant's attorney to General Insurance about when the limitations period expired caused appellee to rely on that date as the date to file suit.

All of these matters are insufficient as a matter of law to create estoppel, under the circumstances of this case. The letter of March 28, 1967 is set out in the margin.[5] It contained no representations or promises which might reasonably be expected to induce reliance by Moore or his attorneys to its detriment, nor was there any deception. *McWaters & Bartlett v. United States*, 272 F.2d 291 (10th Cir. 1959).

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[5]Dear Mr. Neal:

. . . .

We acknowledge receipt of your letter dated March 21, 1967. This is the first notice we have had of such a claim.

At the present time we are asking Professional Constructors, Inc., to give us some information regarding this matter. As soon as we have heard from them we will contact you further.

Nothing in this letter should be deemed a waiver by the General Insurance Company of America of any of the terms and conditions of its bond.

Yours Very Truly,
L. L. Launsbury
Surety Claims

As for the other two bases of appellee's claim of estoppel, it need only be pointed out that the record shows conclusively that at the time of the alleged negotiations and the letter to General Insurance the attorney that appellee asserts was appellant's counsel was at that time counsel for Professional Consfructors only. It was not until a later date that he undertook representation of General Insurance.

The district court is REVERSED with directions to enter judgment for appellant.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26241

GENERAL INSURANCE COMPANY OF AMERICA,
Appellant,

versus

UNITED STATES for the Use of
AUDLEY MOORE & SON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(April 4, 1969)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before ALDRICH,* GODBOLD and DYER, Circuit Judges.

PER CURIAM: In our original opinion we held that appellee's going on the premises to make final in-

*Of the First Circuit, sitting by designation.

spections and to take measurements for the purpose of preparing his final estimate was insufficient to constitute supplying labor [in the prosecution of the work] within the meaning of 40 U.S.C.A. § 270b (b). The visit to the premises by appellant occurred in late April or early May. His activity on the premises had ceased for several weeks. His final payroll had been submitted for the period ending April 2.

Appellee advances the theory that the taking of measurements, and the subsequent preparation of the final estimate on May 4, constituted supplying labor in the prosecution of the work, by reason of a general provision of the contract that "on the 25th of each month * * * * subcontractor shall submit to the contractor an estimate of material on hand and work done." The gist of appellee's argument is that anything which he did in compliance with the terms of his contract constituted furnishing labor in the prosecution of the work, and until he discharged his every legal duty under the contract the statute of limitations did not begin to run.[1] Labor furnished in the prosecution of the work is not co-terminous with the outer limits of all duties provided by the contract.

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[1]Without attempting a definitive list we point out that the contract required appellee to furnish partial releases and partial waivers of liens from his materialmen and creditors as from time to time requested by the prime contractor, to furnish final releases and waivers of liens at the time of final payment, to pay unemployment and retirement taxes (state and federal), and to defend against claims arising from the agreement. The performance of any or all of these obligations can occur after appellee's work is complete and can require expenditure of time and effort by him.

Our original opinion referred, by way of analogy, to the principle that correction of errors does not extend the time for filing suit. In his petition for rehearing appellee directs us to the per curiam opinion in *Trinity Universal Ins. Co. v. Girdner*, 379 F.2d 317 (5th Cir. 1967), which states that the language in 40 U.S.C.A. § 270b (b) "is broad enough to include work performed upon the demand of the government to correct defects in the work as originally completed." *Id.* at 318. We consider *Trinity*. In that case the inspector refused to approve the original work unless defective parts were replaced. This is to be distinguished from the situation in which labor is supplied or material furnished to correct defects after the work has been completed.

Appellee's other assertions of error also are without merit.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (FRAP 35; Local Fifth Circuit R. 12), the Petition for Partial Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.